Supreme Court, U.S.
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No. 90-1441

In The

Supreme Court of the United States

October Term, 1990

MARVIN PINKNEY,

Petitioner,

v.

JOHN KEANE, Superintendent, Sing Sing Correctional Facility, Ossining, New York,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONER

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1. The Respondent's Brief in Opposition to Petition for A Writ of Certiorari is, in effect, a brief on the merits and, rather than setting forth a single reason why certiorari should not be granted, actually provides further reason why it should.

2. The Brief in Opposition does not contest, nor could it properly do so, the Petition's rendering of the history of the case, the facts, or the procedural rules governing appeals in New York. Thus, the questions presented by the Petition are unencumbered by any factual or procedural dispute. *See* Rule 15.1.

3. Respondent argues (Brf. at 12), as the court of appeals held (App. 9-10), that the principle of comity does not apply to a federal court's "correction" of a state appellate court's ruling in a defendant's favor, but only to review of state court rulings against a defendant. That position is a remarkable one, since comity is grounded on respect for the role of state courts in our federal system, and the affront to the state court's ability to decide a constitutional question is the same irrespective of the beneficiary of the decision. *See* Office of Legal Policy, U.S. Dep't. of Justice, Truth in Criminal Justice Series, Report No. 7, *Report to The Attorney General on Federal Habeas Corpus Review of State Judgments* (1988), *reprinted in* 22 U. Mich. J. L. Ref. 901, 957-59, 972-74 (1989). Whether or not this Court would ultimately adopt the position of Respondent and the court of appeals, it is a position that should not pass into law without the Court's review because it calls into question the basic relationship between state and federal courts.

4. Respondent argues that, since a federal habeas court is required to search the record to determine the basis for a petitioner's claim and is not bound by a state court's legal conclusions, it is therefore free to, indeed it must, reassess those legal conclusions and enter its reassessment into any harmless error analysis of the petitioner's claim. (Brf. at 14-19) This was also the view of the courts below. Petitioner submits that, even if this extremely broad view of a federal court's power were true, it should never apply where, as here, the state's highest court was not given the opportunity to address the suspect legal conclusions first. Both aspects of this question warrant the Court's consideration.

5. That New York's highest court was not given the opportunity to address the search and seizure issue – in terms of not only the federal constitution, but also the state constitution or other independent and adequate state grounds – is dealt with by Respondent solely in terms of collateral estoppel principles. Even if the collateral estoppel analysis were correct, however, it does not address the basic questions of federalism that are raised in the petition.

6. In its argument that collateral estoppel principles were not offended by the district court's redeciding the search and seizure issue (Brf. at 8), Respondent cites *Fay v. Noia*, 372 U.S. 391 (1963), and incidentally exposes the district court's and the court of appeals' apparent failure to appreciate the distinction between sovereigns implicated in habeas corpus proceedings:

Fay v. Noia	*Courts Below*
"[H]abeas corpus [has been traditionally characterized as] an original . . . civil remedy for enforcement of the right to personal liberty, rather than as a stage of the state criminal proceedings or as an appeal therefrom. . . . " (*Id.* at 423-24; footnotes omitted.)	"The present habeas corpus application is simply another stage of the same case. It is akin to an appeal by petitioner from the affirmance of the judgment of conviction by the Appellate Division." (App. 20, 42)

If the view of the courts below is a misconception, it is a fundamental one, because it casts a federal habeas court as a "super court of appeals" with almost plenary power to review state court determinations. Whether the federal

court's power is so great is a question that should be addressed by this Court.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: New York, New York
May 30, 1991

Respectfully submitted,

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